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90-1708

No. 90-———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BENTON MUSSLEWHITE,
Petitioner,

v.

THE STATE BAR OF TEXAS,
Respondent.

Petition for a Writ of Certiorari to the Fourteenth Court of Appeals of the State of Texas

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Petitioner was suspended from the practice of law for three years based on allegedly "false and misleading" statements he made in written communications, the sole purpose of which was to establish a dialogue with Scottish solicitors about the prospects of pursuing certain litigation in the state courts of Texas. The first question presented is whether the Texas courts violated petitioner's First Amendment rights in imposing and affirming that sanction, because of their failure to take into account the sophistication of petitioner's intended audience, their failure to require respondent to prove legitimate state interests served by the application of the State Bar's disciplinary rules to petitioner's communications with other attorneys in Scotland, and their application of vague, broadly-defined rules to punish petitioner's exercise of his right of free expression—all in conflict with applicable decisions of this Court, and of other federal and state courts that have afforded constitutional protection to similar attorney communications.

2. Petitioner's suspension also was premised on his alleged violation of a provision of a court-imposed period of disciplinary probation that required him to refer to other attorneys all new clients for a period of time. The second question presented is whether petitioner's due process rights were violated by the imposition of sanctions for an alleged violation of this provision, when he acted consistently with the advice of a court-appointed custodian, and when the conditions of probation were vague, internally inconsistent, and in facial conflict with other State Bar disciplinary rules and prevailing custom and usage, such that petitioner did not have fair notice of what conduct could lead to sanctions.

LIST OF PARTIES

The parties in the Texas courts were the parties listed in the caption to the Petition. Because of the potential applicability of 28 U.S.C. § 2403(b) to this Petition, a copy has been served upon the Attorney General of Texas. Supreme Court Rule 29.4(c).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Benton Musslewhite respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Fourteenth Court of Appeals of the State of Texas, entered in the matter styled *Musslewhite* v. *State Bar of Texas* on February 8, 1990.

OPINIONS BELOW

The opinion of the Fourteenth Court of Appeals of the State of Texas is reported at 786 S.W.2d 437, and is reprinted in Appendix A, at 1a-15a. The decision of the 270th District Court, Harris County, Texas, revoking petitioner's probation and suspending him from the practice of law for three years is not reported. The October 19, 1988 letter order of Senior District Court Judge Solomon Casseb, Jr., granting respondent's motion to revoke petitioner's probation, is reprinted in Appendix B, at 16a-17a. For unexplained reasons, Judge Casseb subsequently issued two separate sets of Findings of Fact and Conclusions of Law. The first set, signed December 27, 1988, is reprinted in Appendix C, at 18a-29a. A second, more elaborate set of Findings of Fact and Conclusions of Law was signed by Judge Casseb on December 29, 1988, and is reprinted in Appendix D, at 30a-49a.

On November 28, 1990, the Supreme Court of Texas denied petitioner's application for writ of error to the Fourteenth Court of Appeals. That Order is reprinted in Appendix E, at 50a-51a. On February 6, 1991, the Supreme Court of Texas denied petitioner's timely motion for rehearing of the application for writ of error. That Order is reprinted in Appendix F, at 52a-53a.

JURISDICTION

The Judgment of the Fourteenth Court of Appeals was entered on February 8, 1990. The Supreme Court of Texas denied petitioner's request for discretionary re-

view of that Judgment in an Order dated November 28, 1990. A timely petition for rehearing of that Order was denied in an Order of the Supreme Court of Texas dated February 6, 1991. This Petition is filed within ninety days of the entry of that Order, and is timely pursuant to Supreme Court Rules 13.1 and 13.4.

This Court has jurisdiction pursuant to 28 U.S.C. § 1257. The federal constitutional issues presented herein were raised in the District Court and Court of Appeals, and rejected. Those issues were presented to the Supreme Court of Texas but it denied discretionary review.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law[.]"

Disciplinary Rules 2-101 and 2-107, contained within the State Bar rules promulgated by the Supreme Court of Texas, are reprinted verbatim in Appendix G, at 54a-56a.[1]

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[1] The version of the Disciplinary Rules set out in Appendix G is that which was in effect in 1988, when petitioner was suspended from the practice of law. DR 2-101, governing Publicity and Advertising, recently has been recodified at SUPREME COURT OF TEXAS, RULES GOVERNING THE STATE BAR OF TEXAS, art. 19, § 9 (Rules of Professional Conduct) Rule 7.01 (1989). *See* App. A, at 4a & n.1. Throughout this Petition, petitioner will refer to the version of DR 2-101 that was in effect at the time of his alleged violations.

STATEMENT OF THE CASE

A. Petitioner's Background.

Petitioner Benton Musslewhite, who will be sixty on his next birthday, has been suspended from the practice of law for three years. He has been a member of the State Bar of Texas since 1954. In that year he graduated with honors from the Southern Methodist University School of Law, and in 1957 he received an LL.M. degree, with honors, from Georgetown University Law School. From 1955 through 1957 petitioner served as a Captain in the United States Army Reserve. He graduated from the Judge Advocate General School at the University of Virginia, and was decorated for his service as an Aide to the Army's Judge Advocate General, stationed at the Pentagon.

Petitioner was appointed by President Kennedy as an Advisor to the National Council on Physical Fitness in 1961 and as a member of the Advisory Board to the Area Redevelopment Administration in 1962. He has twice been an unsuccessful candidate for a seat in the United States Congress, and from 1969 through 1970 served as a Legislative Aide, and then Administrative Assistant, to United States Senator Ralph Yarborough.

Since 1958, and except for his tenure with Senator Yarborough, petitioner has been actively engaged in the practice of law in Texas. Throughout his career at the Bar he has specialized in litigation, primarily on behalf of plaintiffs in complex personal injury cases. He has been involved in many maritime personal injury lawsuits, often representing in American courts foreign workers who were injured in offshore oil exploration and drilling operations sponsored by American petroleum companies. He has served as regional counsel for the National Maritime Union and as American Counsel for the Offshore Petroleum Workers Union of Brazil and Venezuela.

In 1983, petitioner became one of the nine members of the management committee for the plaintiff class in

the Agent Orange litigation. *See, e.g., In re "Agent Orange" Product Liability Litigation*, 818 F.2d 145 (2d Cir. 1987). His unsuccessful challenge to the court-sponsored settlement of that litigation on behalf of Vietnam veterans' organizations led to substantial recognition and notoriety. In February, 1986 petitioner was profiled by the *ABA Journal* as a member of "The New Elite Plaintiffs' Bar." *See* Wagner, *The New Elite Plaintiffs' Bar*, 72 ABA Journal 44, 47 (1986).

Petitioner also is a member of the Bar of this Court, who during the October 1987 Term successfully represented the petitioner in *Chick Kam Choo* v. *Exxon Corp.*, 486 U.S. 140 (1988). In that case, petitioner represented a foreign national, killed in Singapore while working on a vessel owned by an American company. After years of litigation in the state and federal courts, petitioner successfully urged this Court to recognize that federal *forum non conveniens* principles do not necessarily apply to state court litigation initiated by foreign residents. It is ironic that petitioner now has been suspended from the practice of law for three years, in part for urging Scottish solicitors who represented the victims of a North Sea offshore oil platform disaster to consider filing suit against the American owners and operators of the platform in the state courts of Texas, relying upon the principles adopted by this Court in *Chick Kam Choo*. *See* App. 75a, 77a, 82a.

B. The 1987 Disciplinary Proceedings.

In 1986 respondent, the State Bar of Texas, instituted a disciplinary proceeding against petitioner centering on allegations that he had neglected the matters of four clients by failing to return their telephone calls. In 1987 respondent instituted a second disciplinary proceeding against petitioner alleging that he had used paid "runners" to solicit clients on his behalf.[2] The two actions were

[2] These grievance proceedings against the petitioner, and several other prominent Houston plaintiffs' personal injury lawyers, were widely publicized and highly controversial. For example, in a May,

consolidated and in November, 1987 were settled by an Agreed Judgment entered in the District Court of Harris County, Texas. The less than pellucid terms of that Agreed Judgment gave rise to the 1988 disciplinary proceedings that are the focus of this Petition. The Agreed Judgment is reprinted in Appendix H, at 57a-62a.

Under the Agreed Judgment petitioner was suspended from the practice of law for a period of ninety days to commence on November 1, 1988, unless for good cause shown petitioner convinced the District Court to delay commencement of the ninety-day suspension to some other date prior to August 1, 1989. In addition, petitioner was suspended from the practice of law for three years commencing on February 1, 1988, with imposition of that period of suspension suspended and petitioner placed on probation. During this three year period of probation petitioner agreed not to commit professional misconduct as defined by the State Bar Rules and he agreed to "accept no new employment by clients until November 1, 1988, although [petitioner] may refer potential clients to other attorneys." App. H, 59a.

The District Court appointed Hartley Hampton, another member of the Bar, as a custodian over petitioner's practice, and required petitioner to cooperate with the custodian in reviewing petitioner's client files and in informing petitioner's clients about the terms of the suspension and probation. *Id.* 59a-61a. The custodian was authorized to apply to the District Court for the revocation of petitioner's legal fees in any case in which the custodian determined that petitioner had obtained em-

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1987 article the *Houston Post* reported charges from the Chairman of the Executive Committee of the State Bar of Texas that the investigation was being handled by a "runaway prosecutor." The outgoing President of the State Bar was quoted as stating that "vigilante groups are financing the investigation." Houston Post, May 23, 1987, at 27E. *See also* The Texas Lawyer, June 1, 1987, at 1.

ployment in violation of the Disciplinary Rules. *Id.* at 61a-62a.[3]

Finally, petitioner agreed that if he were found by the District Court to have violated any term of his probation, "the Court may revoke such probation and impose a suspension from the practice of law for a period not to exceed three (3) years . . .," *id.* 59a-60a, with petitioner afforded the right to appeal from any such order. *Id.* 60a-61a.

C. The Piper Alpha Disaster.

On July 6, 1988, an off-shore oil platform, known as the Piper Alpha, exploded in the North Sea off the coast of Aberdeen, Scotland. Some 166 men were killed or injured. The platform was owned and operated jointly by American companies or their subsidiaries, including Occidental Petroleum and Union of Texas. Petitioner learned of the disaster several days after it occurred.[4] On Sunday, July 10, 1988, petitioner telephoned a Scottish solicitor, Tony Sandilands, with whom he was working on another matter. That solicitor informed petitioner that he represented two victims of the Piper Alpha explosion, and

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[3] This provision obviously was designed to determine whether, in fact, petitioner had employed "runners" to solicit cases for him, and to require him to forfeit any fees obtained from such cases. The custodian never invoked these procedures. Petitioner consistently has denied that he used "runners" as alleged by the State Bar, and contended throughout the proceedings below that he entered into the Agreed Judgment principally in order to end the expense and distraction caused to his personal life and his law practice by the extensively-publicized State Bar prosecution.

[4] In his initial set of Findings of Fact and Conclusions of Law, Judge Casseb found as Fact "No. 1" that "[b]eginning at approximately 10:30 that morning [July 6], Benton Musslewhite began making telephone calls to Scottish Solicitors to discuss the matter." App. C, at 18a. By contrast, two days later, Judge Casseb correctly found that petitioner did not even learn of the tragedy until July 8 or 9. App. D, at 35a (Finding 34). Many of the District Judge's Findings of Fact are internally inconsistent and unsupported by the record. The Court of Appeals' interpretation of the record was no better. *See* note 15 *infra*.

he expressed disappointment that this Court's decision in *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 (1981), probably precluded any hope for the Scottish victims to retain jurisdiction in the American courts in lawsuits against the American oil companies who owned and operated Piper Alpha.[5] Petitioner disagreed with Sandilands, based on his recent success in *Chick Kam Choo*, and opined that if the victims could prevent removal to the federal court system, and maintain jurisdiction in the state courts of Texas, Louisiana or California, there was a chance for a more favorable outcome on the *forum non conveniens* issue.

Petitioner offered to advance by a few days a trip to England and Portugal he already had planned for July 17, to come to Scotland, and to discuss with Sandilands and other solicitors the jurisdictional issues posed by the Piper Alpha disaster. Sandilands agreed. At that point, petitioner telephoned several other Scottish solicitors with whom he had worked over the years on cases arising out of injuries to North Sea oil workers, and learned that representatives of an American law firm already had arrived in Aberdeen and were attempting to orchestrate a quick settlement on behalf of all or most of the victims. Tr. of Sept. 20, 1988, at 11-15.

Because of his awareness of the problems posed by the terms of his probation, petitioner next contacted several other personal injury lawyers in the Houston area to see if they would be interested in referrals from the Piper Alpha disaster.[6] Petitioner contacted Kelly Newman, a

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[5] In *Piper*, this Court affirmed the dismissal, on *forum non conveniens* grounds, of actions by Scottish victims of an airplane crash over Scotland, which were pending in the federal courts of this country against the American manufacturers of the plane and its propellers. This Court agreed that consideration of the competing private and public interests at stake favored a trial in Scotland. *See* 454 U.S. at 257-61.

[6] Under the terms of the Agreed Judgment petitioner knew that he would not be able to take on any cases himself arising from the Piper Alpha tragedy until November 1, 1988, and would have

former associate in petitioner's firm, and asked whether he would be able to travel to Scotland immediately, contact solicitors that petitioner had known over the years, and discuss with them the prospect of their clients' filing a lawsuit in the state courts of Texas as opposed to participating in a quick, and possibly inadequate, settlement. Petitioner next spoke to John O'Quinn, a prominent Houston personal injury lawyer who also had been a member of the plaintiffs' management committee in the Agent Orange litigation. Mr. O'Quinn was aware of petitioner's Agreed Judgment, and indicated his willingness to accept referrals from petitioner and to allow petitioner to recommend that the Scottish solicitors talk with O'Quinn about their clients' cases. Tr. of Sept. 20, 1988, at 14-21 (testimony of petitioner); at 58-63 (testimony of Kelly Newman). O'Quinn testified that he had authorized petitioner to

> tell the solicitors that if they wanted to have cases filed in Texas and if they wanted me to be involved that I was interested in working with them on such cases or in taking such cases on a referral. . . .
>
> * * * *
>
> I think in all fairness to everybody, I'd have to say that I would probably end up taking those cases. They looked like terrific cases from what little I could tell. Tr. of Oct. 17, 1988, at 190, 192.

Mr. Newman arrived in Aberdeen on July 13, 1988. Petitioner arrived the following evening. Upon arrival in Scotland, Newman and petitioner were informed that because of the hostility of the Scottish press and legal community to the reported tactics of American lawyers in soliciting victims of the Bhopal disaster, they should con-

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to serve a ninety-day suspension at some point between November 1988 and August 1989. But petitioner also knew from past experience that it was unlikely that any of the Scottish solicitors "would actually be hiring any [American] lawyers probably until late this year [1988] or until after they had spent about six months or a year in trying to settle the cases in Scotland." Tr. of Oct. 17, 1988, at 218. *See also id.* at 243.

sider hiring a public relations consultant to help get out their message that they would not deal with victims directly, but only intended to meet with solicitors representing those victims. Tr. of Sept. 20, 1988, at 26-27. The consultant was hired, and on July 15, 1988, he arranged a small press conference attended by five to ten local news reporters. A copy of the news release, distributed at that conference, is reprinted in Appendix K, at 75a-76a. Also on July 15, 1988, petitioner (with the aid of the public relations consultant) distributed a letter to Scottish and United Kingdom solicitors, discussing the purposes of his trip and the complexities of the jurisdictional issues posed by the Piper Alpha tragedy. Petitioner's letter to solicitors is reprinted in Appendix N, at 81a-84a.[7]

On July 16, 1988, petitioner left Aberdeen to handle other business concerns in London and Portugal. He did not return to Scotland thereafter. Newman remained in Scotland and, on July 18, 1988, over the objections of petitioner, placed an advertisement in the Scottish newspapers and issued a letter to the victims and families of the victims of the Piper Alpha disaster. Respondent charged petitioner with allegedly false and misleading statements in the advertisement and the letter to victims, and the Texas courts relied on those communications in suspending petitioner from the practice of law. But Kelly Newman, who authorized the advertisement and signed the letter, never was charged by respondent with any disciplinary violations.[8] The newspaper advertisement is re-

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[7] Respondent sought to revoke petitioner's probation based on allegedly false and misleading statements contained in the news release, constituting professional misconduct in violation of DR 2-101. App. I at 67a-68a. Although respondent did *not* rely on petitioner's letter to solicitors as a basis for revoking petitioner's probation, the District Judge did (at least in his first set of Findings and Conclusions). App. C, at 22a, 27a-28a.

[8] Petitioner argued in a Supplemental Brief tendered to the Court of Appeals that his selective prosecution, and the failure of respondent to charge Newman, demonstrated that respondent was engaged in a campaign of retribution against him for his liberal politics and his pursuit of high-profile litigation against the vested interests of

printed in Appendix L, at 77a-78a; Mr. Newman's letter to victims is reprinted in Appendix M, at 79a-80a.

Petitioner testified that he objected to placing the advertisement and sending a letter to victims, but upon hearing from Newman that they both contained language that "[i]t is our policy not to take any cases except through Scottish or U.K. solicitors," told Newman to make his own decision. Tr. of Sept. 20, 1988, at 50-51. Kelly Newman confirmed that the final decision to run the advertisement and send the letter were his, and that after expressing reservations, petitioner left those decisions to Newman's discretion. *Id.* at 68-70. Newman also testified that based on his reading of this Court's decision in *Shapero* v. *Kentucky Bar Ass'n*, 486 U.S. 466 (1988), there could be no ethical violation as long as the letter and the advertisement clearly stated that "we were not taking any cases except through the solicitors." *Id.* at 75-76.

On July 16, 1988, the day after the press conference, the fact of petitioner's suspension and probation under the Agreed Judgment was first reported in the Scottish press. It was not disputed during the disciplinary proceedings that neither petitioner, nor anyone else connected with his trip to Scotland, ever spoke to or met with any victim or family members of a victim of the Piper Alpha disaster. Moreover, in every communication that was made to the public, they stressed that the Houston lawyers would discuss possible representation of victims only with Scottish or other United Kingdom solicitors. It was also undisputed that whenever petitioner discussed possible legal employment with a solicitor, he revealed to

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the Texas business and legal establishment. *See* note 2 *supra*. The Court of Appeals did not address those issues of selective prosecution and unconstitutional discrimination in violation of the Equal Protection Clause. *But cf.*, *O'Quinn* v. *State Bar of Texas*, 763 S.W.2d 397, 404 (Tex. 1988) (State Bar conceded that only plaintiffs' attorneys in personal injury cases ever had been charged with improper solicitation and Court observed that "this selective prosecution seems to enjoy the sanction of the State Bar Rules").

that solicitor the fact of his upcoming suspension and the terms of his probation. He told those solicitors that for the time being he would be referring cases to John O'Quinn. And contrary to the Findings of Fact made by the District Judge, App. C, at 23a, petitioner made such disclosures even before the first reports concerning the terms of the Agreed Judgment appeared in the Scottish press. *See* Tr. of Sept. 20, 1988, at 34, 42-43; Tr. of Oct. 17, 1988, at 271-73. Respondent presented no evidence that any solicitor or victim was in fact misled by any communication from petitioner or anyone associated with petitioner, nor did respondent make any showing that any of petitioner's statements were inherently misleading based upon past experience. Finally, no Piper Alpha cases were referred to petitioner or any other member of his "team."

D. The Hartman Matter.

In April, 1988, petitioner received a call from another Houston attorney regarding the potential claims of Ronald Hartman, a Vietnam veteran who had been exposed to Agent Orange and who had recently been diagnosed as suffering from lymphoma. Mr. Hartman's children also suffered from birth defects that the family believed were related to his exposure to dioxin. Petitioner met with the Hartmans in April and accepted from Mrs. Hartman a Power of Attorney authorizing petitioner to represent the family in connection with all claims relating to Mr. Hartman's exposure to Agent Orange. PX4. Because the Hartmans had not "discovered" their injuries until after the period to opt out of the New York Agent Orange class action litigation had expired, petitioner theorized that they, and others similarly situated, might not be bound by the terms of the class action settlement. But conscious of his obligation not to take on any new employment, and pursuant to the Agreed Judgment, petitioner informed Mrs. Hartman when she executed the Power of Attorney that he would refer her family's case to another attorney.

Within a few days, petitioner contacted Wayne Mansulla, an attorney with Ashcraft & Gerel in Washington, D.C., who had been actively involved in the Agent Orange litigation. Mr. Mansulla agreed to accept the Hartmans' case and to act as lead counsel for them and for other similarly-situated plaintiffs in a new class action lawsuit to be filed in Texas.

Petitioner next contacted his court-appointed custodian, Hartley Hampton, to inform him of the Hartmans' case. He explained to Mr. Hampton that, in a sense, the Hartmans were not "new" clients because petitioner had been counsel for the entire Agent Orange class. Nonetheless, petitioner felt the need to talk to his court-appointed custodian "personally, directly."

> I said the Hartmans have hired me and some others may be hiring me on some other manifestations of disease that have occurred recently in the Agent Orange situation and that I'm going to refer them to Mr. Mansulla. *He said no problem, just cover your bases.* Tr. of Oct. 17, 1988 at 233 (emphasis added).

Petitioner's testimony on this point was uncontradicted.[9]

On June 22, 1988, petitioner filed a class action on behalf of the Hartman family and others similarly situated in Jefferson County, Texas. He signed the complaint and obtained the permission of Wayne Mansulla and Tod Ensign, an attorney with Citizen Soldier, a New York-based veterans' rights organization, to sign their names as additional counsel for the plaintiffs. PX5. Petitioner participated in a press conference about the filing of the suit that was arranged by Citizen Soldier in Washington. On

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[9] The facts set out herein describing the *Hartman* case are drawn from the uncontradicted testimony of petitioner during the disciplinary proceedings conducted by the Distrct Court, testimony that was largely ignored by the trial judge and the Court of Appeals. Yet the respondent offered *no* evidence, from the Hartmans, from Mr. Mansulla, from Mr. Hampton (petitioner's custodian), or from anyone else to contradict that testimony. Petitioner's testimony is set out in the Tr. of Sept. 20, 1988, at 53-56 and Tr. of Oct. 17, 1988, at 228-38; 282-84; 289-95.

June 28, 1988 petitioner wrote to Mr. Mansulla formally referring him to a group of Texas clients involved in the new Agent Orange suit, including the Hartman family. Petitioner expressly asked Mr. Mansulla to pay any referral fees arising out of this case to his court-appointed custodian, Mr. Hampton, and to keep Mr. Hampton advised of further developments pertaining to the clients. DX8. On July 8, 1988, Mr. Mansulla responded to petitioner's letter, formally accepted referral of the Hartmans' case, and stated that he looked forward to hearing from Mr. Hampton about the arrangements for sharing fees in the matter. *Id.* On August 2, 1988, Mrs. Hartman executed a new Power of Attorney confirming that "WAYNE MANSULLA OF ASHCRAFT & GEREL, in Washington, D.C., by referral from THE LAW OFFICES OF BENTON MUSSLEWHITE, INC." had been employed as the Hartmans' attorneys. DX9.

Despite petitioner's efforts to comply with the Agreed Judgment, and to inform the court-appointed custodian of the Hartman matter, on July 19, 1988 both the custodian and the State Bar moved the District Court to conduct an oral hearing and take discovery concerning petitioner's recent actions, including his alleged solicitation of Piper Alpha victims, and his participation in the press conference at which Citizen Soldier announced the filing of the *Hartman* case. In their motion, Mr. Hampton and respondent alleged that by filing the *Hartman* suit, and participating in the press conference, petitioner "may have violated that provision of this Court's Judgment [that he 'shall accept no new employment by clients until November 1, 1988, although [he] may refer potential clients to other attorneys']." App. J, at 72a.[10] The mo-

[10] Petitioner testified that during the second week of July, Mr. Hampton, the custodian, and Mr. Smoot, counsel for the State Bar, requested a meeting with him about the *Hartman* case. Petitioner told Mr. Hampton, "if there's any question about whether I'm doing the proper mechanics I want to have a meeting. I don't want to have any problem." Tr. of Oct. 17, 1988, at 233. Mr. Smoot canceled the meeting and opted instead to bring the *Hartman* case to the atten-

tion also alleged that press reports had accused petitioner of "soliciting the survivors of the Piper Alpha tragedy to employ him to represent them in wrongful death or other types of tort actions." *Id.*

E. The District Court's Ruling.

After completing its investigation of the Piper Alpha matter and the circumstances surrounding the *Hartman* case, on September 12, 1988, respondent filed its Motion to Revoke Probation. That Motion alleged that petitioner's "acceptance of employment by the Hartmans and the class action claimants violated the terms of probation" in the Agreed Judgment. App. I, at 67a. Respondent abandoned its allegation that petitioner had solicited the Piper Alpha survivors; the Motion asserted instead that the Piper Alpha news release, the advertisement placed by Newman, and the letters Newman sent to a list of victims and their families were all "false and misleading" in violation of DR 2-101. *Id.* at 67a-69a.

Presiding Judge Casseb commenced trial on the Motion to Revoke Probation on September 20, 1988, *just one week after* petitioner was served with a copy of the Motion, and at a time when petitioner's retained counsel was in trial in another county. Judge Casseb rejected petitioner's request for a continuance, which was premised on obvious violations of petitioner's due process rights,[11] but did agree to recess the hearing for thirty days so that petitioner could conduct some discovery related to the charges, and obtain counsel to represent him.

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tion of the District Court. Mr. Hampton later informed Mr. Mansulla of the State Bar's assertion that petitioner had violated the terms of his Agreed Judgment by filing the *Hartman* case, causing Mr. Mansulla to withdraw from representation. *Id.* at 235. Petitioner then secured other attorneys possibly interested in accepting this referral. He testified: "Somebody tell me how to do it [refer the *Hartman* case], I'll do it." *Id.* at 236.

[11] This Court's decision in *Roller* v. *Holly*, 176 U.S. 398 (1900), holds that five days' notice of a contested hearing violates due process of law. In *In re Ruffalo*, 390 U.S. 544, 550 (1968), this Court held that in a disbarment action an attorney is entitled to procedural due process, "which includes fair notice of the charge."

Respondent presented its case against petitioner, and called petitioner to the stand as an adverse witness, on September 20, 1988. The District Court reconvened on October 17, 1988, and took additional evidence and heard arguments over the course of two days. The following day, October 19, 1988, Judge Casseb issued a letter order granting the respondent's Motion to Revoke Probation, and suspending petitioner from the practice of law for three years. App. B, at 16a-17a. The District Judge subsequently issued his dual sets of Findings and Conclusions on December 27 and 29, 1988.

The District Judge found that by having Mrs. Hartman execute a Power of Attorney in April, 1988, petitioner violated the terms of his probation. App. D, at 44a. The Court rejected petitioner's argument that the Hartmans already were his clients by virtue of prior Agent Orange class action litigation, and ruled that petitioner's subsequent referral of the Hartmans to Mr. Mansulla was of no consequence. *Id.* The Court ignored substantial expert testimony that petitioner's conduct in entering into an employment relationship with the Hartmans before referring their case complied with prevailing custom and usage. *See* note 23 *infra.*

The District Judge concluded that the Piper Alpha news release was false and misleading for the following reasons: *First*, it failed to identify the "term of internationally renowned U.S. lawyers based in Houston, Texas," and failed to identify the attorneys who were described in the release as "some of the best in the world in handling mass disaster litigation;" *second*, the statement that the team " 'would be working with UK solicitors to represent . . . victims . . .' is false and misleading because it suggested that [petitioner] or the team already had Piper Alpha clients . . .;" *third*, the designation of petitioner "as the 'team's lead counsel' is false and misleading because the release does not disclose" the terms of petitioner's probation and upcoming ninety day suspension; *fourth*, those same statements were false and

misleading because the true purpose of all concerned was that O'Quinn, rather than petitioner, would be lead counsel; and *fifth*, the reference to the attorneys on the team as " 'some of the best in the world in handling mass disaster litigation' is [a] false and misleading . . . statement of opinion as to the quality of legal services," not susceptible to reasonable verification. App. D, at 45a-46a.

In addition, Judge Casseb found in the news release an impermissible estimate of the range of recovery of damages. *Id.* at 46a.[12] And he noted that petitioner had failed to include a disclaimer in the release that he was not Board Certified by the Texas Board of Legal Specialization. *Id.* at 46a.[13]

Judge Casseb also concluded that petitioner was responsible for Newman's actions in taking out the newspaper advertisement and sending out the letters to victims. *Id.* at 46a-47a. He then made similar findings that both those publications were false and misleading in some of the same respects as the news release. *Id.* at 47a-48a.

Finally, Judge Casseb concluded that for *each* of the separate violations of the Disciplinary Rules he had found, petitioner's probation should be revoked and he should be suspended for three years. *Id.* at 48a-49a.

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[12] The news release contained no estimate of damages. It does quote petitioner as commenting: "The jurisdictional complexities and favourable punitive damages law make Texas the best place for suit to be filed by victims or victim's facilies . . . ." App. K, at 75a.

[13] Throughout the proceedings below no court ever reconciled the fact that whereas petitioner had not been "Board Certified" as a trial specialist, O'Quinn had been. Moreover, respondent did not offer, and the courts did not require, any evidence concerning the requirements for Board Certification, the relationship of those requirements to the problems posed by the prospective Piper Alpha litigation, or the interest, if any, that a Scottish solicitor would have in knowing that petitioner was not Board Certified and that O'Quinn was.

F. The Opinion Of The Court Of Appeals.

Petitioner sought supersedeas pending appeal, and expedited review by the state appellate courts. He was unsuccessful on both counts.[14] Petitioner's three-year period of suspension comemnced on January 31, 1989. Over a year later, the Fourteenth Court of Appeals issued its opinion affiming the District Court's ruling.[15]

The Court of Appeals rejected petitioner's argument that the Piper Alpha news release, letters and advertisements were not misleading in part because they had been directed to a sophisticated audience of Scottish solicitors. The Court, without reasonable explanation, stated that because the advertisement and letters would have been read by victims, and because the letter suggested that a victim could call Mr. Newman to give him the name of his solicitors, it followed that all three communications "[c]learly . . . were directed to the victims of the tragedy, not their solicitors." App. A, at 5a-6a. The Court next reejcted petitioner's argument that DR 2-101 is unconstitutionally vague. *Id.* at 6a-7a. With respect to petitioner's other federal constitutional arguments, which were grounded in this Court's rulings defining the First Amendment protection afforded to attorney advertising, the Court of Appeals simply begged off. It held that the Supreme Court of Texas had adopted DR 2-101, and it was not the function of an intermediate court to "nullify or alter it." *Id.* at 7a.

The Court of Appeals then affirmed the District Judge's findings that all the communications at issue were "false

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[14] Petitioner, acting *pro se*, sought relief from this Court based on the failure of the Texas State Bar Rules to provide for supersedeas pending appeal for a suspended attorney. *Musslewhite* v. *The State Bar of Texas*, No. 89-555, *cert. denied*, —— U.S. ——, 110 S.Ct. 503 (Nov. 27, 1989).

[15] The Court of Appeals opened its discussion of the facts by adopting the clearly-erroneous "finding" of the District Court that petitioner began calling Scottish solicitors about the Piper Alpha disaster on the day it occurred, which was two or three days before petitioner even knew about the disaster. App. A, at 2a. *See* note 4, *supra*.

and misleading" in failing to identify the team of lawyers and in making statements about the team that were not subject to reasonable verification; in implying that the team already had secured clients; in failing to disclose the terms of petitioner's probation and future ninety-day suspension; and in failing to include the required disclaimers concerning Board Certification at 7a-8a. The Court also affirmed the District Judge's conclusion that petitioner was fully responsible for Newman's actions in publishing the advertisement and mailing the letters. *Id.* at 8a-9a.

With respect to the *Hartman* case, the Court held that the Hartmans were new clients, and that petitioner's referral of them to Mr. Mansulla took place *after* he had filed suit on their behalf. *Id.* at 10a-11a. In so holding, the Court of Apeals ignored the undisputed facts that petitioner had obtained Mr. Mansulla's oral agreement to represent the Hartmans *before* the suit was filed, that the Hartmans had agreed to such a referral in April when they first met with petitioner, and that this was confirmed by the appearance of Mr. Mansulla's signature on the complaint itself.

With respect to petitioner's claim that the Agreed Judgment was unconstitutionally vague insofar as it prohibited him from accepting new employment but allowed him to refer potential clients to others, the Court held that this Court's decisions on the vagueness doctrine would not apply to the terms of a judgment agreed to by the petitioner. *Id.* at 11a. Moreover, the Court found no inconsistency between the terms of the Agreed Judgment and Texas DR 2-107, which seems on its face to require that an attorney be "employed" by the client before he is permitted to share in any fees with another attorney to whom he refers the client's case. *Id.* at 11a-12a. As for petitioner's reliance on the advice of the court-appointed custodian, who told him that his acceptance and referral of the Hartmans as clients were "no problem," the Court stated, without record citation and contrary to the record

facts, that "Musslewhite's representation that he planned to refer the case was false." *Id.* at 13a.[16]

The Court of Appeals also rejected all of petitioner's so-called "procedural complaints." It found no error in the District Court's refusal to continue the hearing, illogically concluding that the Motion to Conduct Hearing respondent filed in July gave petitioner "sufficient notice" of the charges that would be lodged against him in September. The Court also held that petitioner waived any due process error by accepting the thirty-day recess the District Judge granted for the completion of the hearing. *Id.* at 13a. Finally, even though the District Judge did not hold a separate hearing on the severity of the sanctions to be imposed, the Court of Appeals read Judge Casseb's mind and concluded that he had taken all the relevant factors into account in imposing a three year suspension. *Id.* at 14a-15a. In the last, inexplicable passage of its opinion the Court noted that "Musslewhite agreed to the three year suspension when he signed the agreed judgment . . . and cannot now complaint of the punishment to which he agreed." *Id.* at 15a.[17]

In spite of the near total abnegation of the function of appellate review evidenced by the Fourteenth Court of

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[16] In an opinion that bristles with unfounded statements about record facts, the quoted passage stands out. Not only was there no evidence presented in the District Court to support an accusation that petitioner did not intend to refer the *Hartman* case to Mr. Mansulla when he spoke with his custodian, but in fact, according to petitioner's uncontradicted testimony, he already had referred the case to Mr. Mansulla, and Mr. Mansulla had agreed to accept the referral. Neither Mr. Mansulla nor Mr. Hampton were called as witnesses by the State Bar. There is no reason to believe that respondent would have hesitated to do so if the State Bar believed that petitioner's testimony was not truthful.

[17] The Agreed Judgment, of course, did not dictate that *any* violation of the terms of petitioner's probation would result in a three year suspension. It states instead that in the event of a violation, "the Court *may* revoke such probation and impose a suspension from the practice of law for a period *not to exceed* three (3) years . . . ." App. H, at 59a-60a (emphasis added).

Appeals' opinion, including its decision to "pass the buck" on all First Amendment issues to the Supreme Court of Texas, that Court delayed ruling on petitioner's Application for Writ of Error for nearly seven months, and then denied it. A Motion for Rehearing was denied two months later. Thus, as of the date of this Petition, petitioner's First Amendment claims have not been addressed by an appellate court, although petitioner has endured two years and three months of the three year term of an unconstitutional suspension from the practice of law.

REASONS FOR GRANTING THE WRIT

I. PETITIONER'S SUSPENSION FROM THE BAR, BASED ON HIS COMMUNICATIONS DIRECTED TO SCOTTISH SOLICITORS, CANNOT BE SUSTAINED CONSISTENT WITH THIS COURT'S DECISIONS AFFORDING FIRST AMENDMENT PROTECTION TO SUCH COMMUNICATIONS.

This case presents this Court for the first time with the application of state bar disciplinary rules on advertising to communications between attorneys. Respondent accused petitioner of making "false and misleading" statements in order to attract referrals of Piper Alpha clients. Yet it was undisputed that petitioner scrupulously avoided any direct contact with those laypersons, and intended merely to establish a dialogue with their solicitors about the potential for Piper Alpha litigation in the courts of Texas. Respondent and the courts below failed to recognize the unique First Amendment issues posed by the sophistication of petitioner's intended audience, and by the State Bar's diminished interest in regulating the content of petitioner's statements to that audience. They erred in discounting completely the solicitors' ability to verify the accuracy of petitioner's statements, and to distill the facts, opinions and advice he provided for the benefit of their clients.

Moreover, the opinions of the District Court and the Court of Appeals totally ignore this Court's decisions, commencing with *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), which afford First Amendment protection to

all forms of printed attorney advertising. *See Shapero* v. *Kentucky Bar Ass'n*, 486 U.S. 466 (1988) (direct mailing to a targeted list of potential clients); *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (newspaper advertisement designed to attract the attention of a targeted group of potential clients); *In re R.M.J.*, 455 U.S. 191 (1982) (announcement cards).[18]

In this case petitioner utilized a press release in an effort to inform the Scottish public that he was present in Scotland and was working with Scottish solicitors to explore the potential for filing an action in the Texas courts against the Texas-based petroleum companies involved in the Piper Alpha disaster.[19] The press release quoted petitioner as stating: "I would stress that my team will not accept any cases except through Scottish or UK-based solicitors." *See* App. K, at 75a-76a. The newspaper advertisement and letter to victims, although they were published over petitioner's objection, also made clear that the Houston attorneys would take no cases except through Scottish or other United Kingdom solicitors. App. L, at 77a; App. M, at 79a. The printed communications thus made clear that petitioner would accept no referral from a victim or family member, and would initiate no contact with them, absent further discussions and agreements with the victims' solicitors.

The fact that all three challenged communications were clearly designed to establish contact between petitioner's "team" of attorneys and the victims' solicitors is important for two reasons, both of which were ignored by the Texas courts.

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[18] This Court consistently has distinguished between all forms of written communications with prospective clients and face-to-face solicitation. *Compare Shapero*, 486 U.S. at 472 and *Zauderer*, 471 U.S. at 641-42, *with Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447 (1978).

[19] Respondent presented no evidence at trial that the news release itself was disseminated to the public, nor that it was read or received by anyone other than the handful of local reporters who attended the press conference.

First, this Court observed in *Bates* that "[t]he determination whether an advertisement is misleading requires consideration of the legal sophistication of its audience." 433 U.S. at 383, n.37. "Thus, different degrees of regulation may be appropriate in different areas." *Id.* In judging whether the communications at issue were false and misleading, the Texas courts absolutely refused to judge whether petitioner's statements had any capacity to mislead the solicitors who were petitioner's intended audience. The reason is simple—nothing that was said in the three communications actually misled any solicitor (or for that matter, any victim or family member), and nothing that was said in print was not subject to reasonable vertification by a solicitor.

The ruling of the Court of Appeals in this case cannot be squared with the decision of the United States District Court for the Eastern District of Pennsylvania, which invalidated a state bar rule that forbade attorneys to represent to other attorneys, through a printed announcement, that they had any "special competence or experience." *See Spencer* v. *Honorable Justices of Supreme Court of Pennsylvania*, 579 F. Supp. 880 (E.D. Pa. 1984), *aff'd mem.*, 760 F.2d 261 (3d Cir. 1985). In *Spencer*, the Court held that "[l]awyers are capable of understanding, evaluating, and distilling legal advertisements and thus prohibiting plaintiff from making representations as to his background, education, and experience to other lawyers is unnecessary to advance any state interest and therefore unconstitutional." 579 F. Supp. at 892 (citing *Bates*, *supra*, 433 U.S. at 383 n.37). If the Court of Appeals in this case had applied *Spencer*'s analysis to the facts presented by petitioner's communications with Scottish solicitors, it would have concluded that the State Bar had no interest in regulating petitioner's statements in Scotland, let alone in suspending him from the practice of law for three years based on those statements. *See also Matter of Jaques*, 407 Mich. 26, 281 N.W.2d 469 (1979) (holding that attorney could not be suspended, consistent with *Ohralik*, for soliciting union members through the

"buffer" of the union's business agent, who possessed the expertise to evaluate the attorney's qualifications before passing along his name to the union members).[20]

Second, this Court also recognized in *Bates* that an advertisement "does not provide a complete foundation on which to select an attorney." 433 U.S. at 374. In the factual context of this case it was certain that a Scottish solicitor never would refer a Piper Alpha victim to petitioner or his group sight unseen. What petitioner hoped to accomplish through his printed communications was the establishment of a dialogue between himself and a group of Scottish solicitors concerning the prospects for successful litigation in the state courts of Texas. During the course of that dialogue, the solicitors were free to probe, and did probe, petitioner concerning those aspects of the printed communications that the Texas courts later found to be misleading or not subject to reasonable verification. Respondent presented no evidence that any solicitor (or victim) actually was misled by any of petitioner's statements. Yet petitioner was suspended from the practice of law for three years because of the presumed, but unproven, potential of his statements to mislead. *See Peel* v. *Attorney Registration & Disciplinary Comm'n*, —— U.S. ——, 110 S.Ct. 2281, 2287-88 (1990) (rejecting state's claims that the "potentially misleading" nature of an attorney's statements concerning his certification as a trial specialist by the National Board of Trial Advocacy warranted a categorical prohibition on their use).

In erroneously concluding that petitioner's statements were "false and misleading," without examining their context and without assessing the sophistication of the intended audience, the Court of Appeals also failed to fulfill its obligation as an appellate court to

> "'make an independent examination of the whole record' in order to make sure that 'the judgment

[20] The affirmance of *Spencer* by the Court of Appeals for the Third Circuit and the Michigan Supreme Court's decision in *Jaques* creates a conflict on this important federal constitutional issue within the meaning of this Court's Rule 10.1(b).

> does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984) (quoting *New York Times* v. *Sullivan*, 376 U.S. 254, 284-86 (1964)).

Milkovich v. *Lorain Journal Co.*, —— U.S. ——, ——, 110 S. Ct. 2695, 2705 (1990). *See also Peel, supra*, —— US. at ——, 110 S. Ct. at 2291-92 ("whether the inherent character of a statement places it beyond the protection of the First Amendment is a question of law over which . . . this Court should exercise *de novo* review"); *Ohralik, supra*, 436 U.S. at 463 (court "must undertake an examination of the record to determine whether [attorney's] conduct was constitutionally protected").

The record in this case is sparse. Respondent's sole evidence that petitioner's statements in the news release, advertisement and letter were false and misleading was based essentially on the words of the documents themselves. Each of the statements is reprinted in full in six pages of the Appendix to this Petition. *See* App. K, L & M, at 75a-80a. Respondent presented no other evidence to show how the statements at issue were in fact misleading, nor that the same types or categories of statements are inherently misleading. This failure of proof alone should have caused the Court of Appeals to reverse petitioner's suspension. *See In re R.M.J., supra*, 455 U.S. at 205-06.

From the record presented, it is clear that the application of the Texas Disciplinary Rules to petitioner's Piper Alpha communications was unconstitutional. Texas DR 2-101(A) prohibits a lawyer from making "on behalf of himself, his partner, associate, or any other lawyer, any false or misleading communication about the lawyer or the lawyer's services." It then defines a false or misleading communication to include a communication that:

> (1) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not misleading;
>
> * * * *

> (3) Contains a representation or implication regarding the quality of legal services which is not susceptible to reasonable verification by the public; [or]
>
> (4) Contains predictions of future success . . . .[21]

Texas' version of DR 2-101 also includes, in subparagraphs (B) and (C), requirements that all advertisements with regard to any specific area of the law include the name of the lawyer responsible for the performance of legal services in that area, and contain a statement whether or not that lawyer has been awarded a Certificate of Special Competence by the Texas Board of Legal Specialization in that area. *See* App. G at 54a-55a.

These provisions of DR 2-101 were applied to petitioner in a manner that violated his constitutional right of free speech. First of all, the Texas courts never explained why the failure of the news release, letter or advertisement to identify all the members of the team from Houston was itself misleading. Petitioner plainly was identified in the news release he issued; Mr. Newman identified himself as the source of the advertisement and as the author of the letter. Their testimony that they subsequently, in meetings and other communications with Scottish solicitors, identified Mr. O'Quinn as a part of the "team" was uncontradicted.

The inference drawn by the Court of Appeals that statements that the team of attorneys from Houston "*would be working* with United Kingdom solicitors to represent . . . Piper Alpha [victims]" suggested that they already had secured Piper Alpha clients, and was therefore false and misleading, is inexplicable. Petitioner and

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[21] The complete text of DR 2-101 is set out in App. G, at 54a-55a. The District Court concluded that petitioner's statements violated sub-paragraphs (A)(1), (3), and (4). These provisions of DR 2-101(A) are not dissimilar to Rule 7.1 of the ABA Model Rules of Professional Conduct, currently in effect in Texas and many other states.

Newman were in fact "working with" a number of Scottish solicitors to discuss the potential for a lawsuit in the state courts of Texas, and they did in fact propose that they "would work with" those solicitors if a decision was reached to file that suit.

The published statements that petitioner was the "team's lead counsel" were not misleading. Petitioner had the special knowledge and expertise concerning the jurisdictional issues that were of importance to the Scottish solicitors, based on his handling of *Chick Kam Choo* and similar cases. Whether in fact he would be able to take on individual clients' cases would depend on the timing of the eventual decision to file suit, a decision that was premature. *See* note 6 *supra.* Moreover, whenever any of the solicitors spoke with petitioner about actually referring a client to him, petitioner disclosed to that solicitor the terms of his probation and upcoming ninety-day suspension.

The various references to the team as "experienced" or "among the best" in handling mass disaster litigation were mere "puffing" at worst, and essentially truthful. Both Musslewhite and O'Quinn had vast experience in these types of cases. Respondent never offered any evidence to the contrary. Moreover, such statements were susceptible to reasonable verification by the Scottish solicitors, many of whom had known and worked with petitioner on scores of cases over the course of more than a decade.

In short, a searching review of the record reveals that the statements at issue were not "false and misleading." Respondent and the state courts merely labeled the statements as such to avoid the obvious conclusion that all of petitioner's statements in Scotland were protected by the First Amendment.

Petitioner also was sanctioned for the failure of the press release, the advertisement and the letter to include disclosures that he was not board certified as a litigation specialist. The record presented by the respondent, how-

ever, is devoid of any evidence concerning the Texas Board of Legal Specialization and its requirements for certification as a specialist in litigation. There is no basis upon which this Court can judge whether the requirements for such certification are or would be meaningful to a Scottish solicitor seeking to retain an American lawyer to pursue an action in the United States arising out of the Piper Alpha disaster. This case thus represents the flip-side of this Court's recent decision in *Peel.*

Petitioner should not have been severely sanctioned for failing to include in communications to Scottish solicitors that he was not certified as a trial specialist in Texas, particularly when his qualifications, expertise and experience made him uniquely qualified to engage in the type of work he was discussing with those solicitors. The disclaimer requirements of DR 2-101(C), in the context of petitioner's communications directed to other attorneys in Scotland, were irrelevant and immaterial.[22]

The First Amendment issues presented by petitioner's case are important. Texas DR 2-101(A), like the current version of the ABA's Model Rule 7.1, defines a false and misleading communication as one that "omits facts necessary to make the statement considered as a whole not materially misleading." DR 2-101(A) also defines a misleading statement as one "not susceptible to reasonable verification." In this case, those vague definitions were applied to petitioner's legitimate activities in attempting to inform solicitors for injured Scottish victims of the Piper Alpha disaster of a possible alternative forum to seek redress of their injuries. The resulting sanctions cannot be squared with the principle that "'[a] relevant inquiry in appraising a decision to disbar is whether the attorney stricken from the rolls can be

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[22] In fact, one commentator on the Texas rules has concluded that DR 2-101(C)'s requirement of a Board Certification disclaimer is always confusing, potentially misleading to the public, and advances no legitimate state interest. Rosenberg, *Texas Disciplinary Rule 2-101(C): The Fine Art of Disinformation,* 22 Hous. L. Rev. 909, 923-24 (1985).

deemed to have been on notice that the courts would condemn the conduct for which he was removed.'" *Zauderer*, *supra*, 471 U.S. at 653, n.15, *quoting In re Ruffalo*, 390 U.S. 544, 554 (1968) (White, J., concurring in result).

Furthermore, the Texas courts ignored the important fact that petitioner solicited no victims of the Piper Alpha disaster, and spoke to no one other than solicitors. His news release, and the letters and advertisements attributed to him by the respondent and the state courts, are thus much closer to the expressive and associational conduct that is entitled to full First Amendment protection under *In re Primus*, 436 U.S. 412 (1978), than to the commercial price advertising at issue in *Bates*, or the face-to-face solicition condemned in *Ohralik*.

The sanctions imposed on petitioner by respondent, and affirmed by the Texas courts, for alleged violations of DR 2-101, are much more severe than any this Court has considered in past attorney advertising cases. The Court of Appeals refused to address the important First Amendment issues presented by this case, deferring to the Supreme Court of Texas. That Court declined review. Thus, plenary review of the judgment below by this Court is essential, not only to vindicate petitioner's First Amendment rights, but to provide further clarification and guidance concerning the limits that must be imposed on state bar associations and state courts in attempting to sanction attorney communications that may conveniently be labeled as "false and misleading" under broad and vague definitions that are not consistent with the rights of all attorneys to engage in free expression.

II. IN SUSPENDING PETITIONER FROM THE PRACTICE OF LAW BASED ON HIS ACCEPTANCE OF THE HARTMANS AS CLIENTS AND REFERRAL OF THEIR CASE TO OTHER COUNSEL, RESPONDENT AND THE TEXAS COURTS VIOLATED PETITIONER'S RIGHT TO DUE PROCESS OF LAW.

It cannot be doubted that the rights of procedural due process must be afforded to attorneys facing grievance proceedings. *In re Ruffalo*, 390 U.S. 544, 550-52 (1968).

It is also a fundamental principle that a regulation that "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926). *See also Grayned* v. *City of Rockford*, 408 U.S. 104, 108-09 (1972).

In confronting the situation posed by the Hartmans' case, petitioner knew that he was required by the Agreed Judgment to accept no new employment from clients until November 1, 1988, but he also knew that he was free to refer those clients to other attorneys, and to be paid a share of any eventual attorneys' fees for the referral. App. D, at 43a-44a. In making the referral, petitioner also was confronted with Texas DR 2-107(A)(1), which seems on its face to prohibit the payment of a referral fee to an attorney who is not "employed" by the client. *See* DR 2-107(A)(1) (requiring that the client consent to the "employment of the other lawyer" as one of three necessary conditions for the sharing of fees).[23]

In the face of the incongruity between the terms of the Agreed Judgment and DR 2-107(A)(1), petitioner consulted with the court-appointed custodian over his practice, and explained to him that he had been retained by the Hartmans, would be referring the matter to Mr. Mansulla, and would have Mr. Mansulla contact the custodian regarding the sharing of any fees. The custodian stated that he had "no problem" with this arrangement. *See* App. A, at 13a.

Despite petitioner's prompt disclosure of all that he was doing to the court-appointed custodian, and despite

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[23] DR 2-107(a)(1) is reprinted in full in App. G at 55a-56a. Substantial expert testimony was presented during the District Court proceedings that ordinarily a Texas attorney who refers a case to another lawyer and expects a referral fee must have been employed by the client. Thus, petitioner's actions in referring the Hartmans to Mr. Mansulla after accepting a Power of Attorney were consistent with prevailing custom and usage. *See* Tr. of Oct. 17, 1988, at 173-79; 297-308.

the fact that he did refer the Hartmans to Mr. Mansulla, he has been suspended from the practice of law for three years based in part on his "employment" by the Hartmans. The Court of Appeals has now held, retrospectively, that DR 2-107 does *not* require that a referring attorney must be employed by the client in order to receive a referral fee. App. A, at 11a-12a. That Court also has held that respondent should not have been estopped by the custodian's statements from seeking to revoke petitioner's probation, because petitioner never really intended to refer the case to Mr. Mansulla. *Id.* at 13a. The latter finding flies in the face of the record evidence that petitioner planned to refer the case when he first met with the Hartmans, immediately obtained their consent to do so, referred the case to Mr. Mansulla before the lawsuit was filed, and that Mr. Mansulla accepted the referral.

The violations of petitioner's due process rights implicated by respondent's treatment of the *Hartman* matter, by the failure of the state courts to estop respondent from disavowing the advice given to petitioner by the court-appointed custodian, and by the ambiguous and conflicting directions contained in the Agreed Judgment and in DR 2-107(A)(1) are of sufficient importance that this Court should grant plenary review of these issues, as well as the First Amendment issues raised by petitioner's suspension based on his Piper Alpha communications.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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